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OFFICE OF PERSONNEL MANAGEMENT

5 CFR Part 890

48 CFR Parts 1602, 1615, 1632, and 1652

RIN 3206-AM39

Federal Employees Health Benefits Program: New Premium Rating Method for Most Community Rated Plans

AGENCY: U.S. Office of Personnel Management.

ACTION: Final rule.

SUMMARY: The U.S. Office of Personnel Management (OPM) is issuing a final regulation amending the Federal Employees Health Benefits (FEHB) regulations and also the Federal Employees Health Benefits Acquisition Regulation (FEHBAR). This final regulation makes minor changes to an interim final regulation on the same subject published June 29, 2011. The rule replaces the procedure by which premiums for community rated FEHB carriers are compared with the rates charged to a carrier's similarly sized subscriber groups (SSSGs). The new procedure utilizes a medical loss ratio (MLR) threshold, analogous to that defined in both the Affordable Care Act (ACA), and in Department of Health and Human Services (HHS) regulations and replaces the outdated SSSG methodology with a more modern and transparent calculation while still ensuring that the FEHB Program is receiving a fair rate. This will result in a more streamlined process for plans and increased competition and plan choice for enrollees. The new process will apply to all community rated plans, except those required by their state to

use traditional community rating (TCR). This new process will be phased in over two years, with optional participation for non-TCR plans in the first year.

DATES: This final rule is effective [INSERT 30 DAYS AFTER THE DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Louise Dyer, Senior Policy Analyst, (202)606-0770.

SUPPLEMENTARY INFORMATION: The Office of Personnel Management is issuing a final regulation to establish a new rate-setting procedure for most FEHB plans that are subject to community rating. This final rule makes minor changes to an interim final rule published June 29, 2011 that replaced the current rate negotiation process with a requirement that most community rated plans meet an FEHB-specific medical loss ratio (MLR) target. Plans that are required to use traditional community rating (TCR) per their state regulator will be exempt from this new rate-setting procedure. This final rule makes several changes to the interim final rule published June 29, 2011. First, OPM has removed a clause that said that the previous year's MLR would have no effect on the current plan year. The change was added in response to public comments and is intended to give OPM appropriate flexibility to determine a fair and accurate MLR for each plan in each year. Second, OPM has laid out a deadline for publishing the FEHB-specific MLR threshold. Third, OPM made technical changes to a certificate attesting to accurate pricing in order to accommodate a change in timing. Fourth, clarifying language explains that OPM will substitute its own credibility adjustment for that defined by HHS.

Analysis of and Responses to Public Comments

We received two comment letters on the interim final rule from FEHB carriers and carrier groups. The comments and OPM's responses are detailed below.

Comment: A commenter noted that FEHB carriers will need as much advance notice of the MLR threshold for the following year as possible. This commenter recommended early notice by OPM, even in advance of the annual Call Letter, to allow carriers to plan for rating actions and complete filings.

Response: For the first years of MLR-based rate negotiation, OPM will be gathering information about FEHB carrier MLRs which will aid in setting future MLR thresholds. OPM will make every effort to provide such advance notice as the rate negotiation methodology matures. This final regulation text states that OPM will make the MLR threshold public no later than twelve calendar months before plan years beginning with 2014.

Comment: A commenter raised the need for clarity and consistency regarding the identification and allocation of costs and revenues for the MLR calculation. Specifically, the commenter asked for additional clarification on what can be included as expenses, such as fees and charges related to Affordable Care Act implementation.

Response: As stated in the interim final regulation, OPM will adopt the HHS definition of MLR for purposes of MLR-based rate negotiation in FEHB. We anticipate that any clarifications around this calculation that are offered by HHS will be adopted by OPM. OPM will only allow costs for items that are allowed by the FEHB contract to be included in the MLR calculation.

Comment: Both commenters raised concerns about the subsidization penalty reserve account.

One commenter stated that using penalty funds to subsidize other plans is inconsistent with both the current similarly sized subscriber group (SSSG) methodology and the ACA MLR rebates.

Another commenter stated that OPM needs to be sure that this reserve does not act as a disincentive for carriers to operate in the most efficient way possible.

Response: OPM has intentionally structured the subsidization penalty differently from either the SSSG adjustments or the ACA MLR rebates. The subsidization penalties are to be shared among community rated plans in order to avoid a plan paying a penalty into an account from which it can solely benefit.

In response to the concern about the subsidization penalty reserve acting as a disincentive to efficiency, OPM feels the penalty will encourage plans to offer a fair rate at the time of proposal and therefore will not act as a disincentive to efficiency.

Comment: Both commenters expressed concern about OPM's plan to calculate MLR using one year of data, as compared to a three year average for the HHS calculation. The commenters were concerned about large FEHB plans having to manage between the two methodologies. One commenter mentioned that an annual MLR calculation would not allow FEHB plans to mitigate variation when carriers engage in activities that entail large one-time start up costs.

Response: Regarding the commenters concern about managing two methodologies, OPM feels applying an MLR calculation similar to the ACA required calculation, instead of the SSSG methodology, provides more consistency than there would have been without this regulatory change.

OPM must balance its goal of negotiating the best rate for FEHB payers every year with the concerns of FEHB carriers about managing variation. For example, OPM may consider the MLR for one or more previous years when calculating the current year's MLR. This allows OPM the flexibility to prevent carriers who have historically offered favorable rates from being overly penalized for an unusually low MLR in a given year. OPM issues its annual rate instructions to plans well in advance of contract negotiations which would contain any variations required to address such concerns.

Comment: A commenter stated the need for advance knowledge and understanding of the criteria that will be applied during the annual reconciliation audit. Specifically, the commenter asked to better understand the factors that will be considered and the potential outcomes of the reconciliation process itself once applied. Additionally, the commenter would like to understand the roles of OPM and the OPM Inspector General in audit oversight.

Response: OPM does not have plans to change any element of the audit process as a result of this regulation. As such, OPM will not add any information about the audit process to this regulation.

Comment: A commenter raised a concern about how the ACA MLR rebates will be treated in calculating the FEHB MLR. Specifically, the commenter wanted to be sure that disregarding the ACA MLR payments from the FEHB MLR calculation will not result in inappropriate duplicative payments and suggested that the methodology be revised to include any ACA rebate in the numerator along with medical costs.

Response: The ACA rebate for a carrier reflects a three year average MLR for their entire book of business and is not specific to the FEHB. OPM wants the FEHB MLR to be representative of only FEHB experience. Its purpose is to ensure the FEHB is receiving a fair rate each year. Including data that is not specific to FEHB claims experience and premiums would diminish OPM's ability to do this. Duplicative payments should not result because any amounts paid to the subsidization penalty reserve should be captured in the following year's ACA MLR calculation.

Comment: A commenter recommended that OPM permit plans to aggregate premiums by parent company when calculating the MLR to mitigate wide variation in MLRs among a parent company's plan offerings.

Response: The regulation allows for this recommendation through the rate instructions if OPM deems it to be appropriate. We do not expect to allow for aggregation within the first few years of implementing MLR, but will consider this option as the MLR experience matures.

Comment: One commenter expressed concern about OPM's plan to use a different form than HHS for submitting MLR information. The commenter is concerned about the administrative burden of the two forms and recommends that OPM follow the model of the HHS form and make it public before the end of 2011.

Response: Because formula for calculating the MLR required in this context is the same as that outlined in 45 CFR Part 158, OPM intends to model its form closely on the HHS form.

Comment: One commenter recommended that OPM implement a credibility adjustment for small or new plans for the MLR calculation in the 2012 pilot year.

Response: OPM agrees that such an adjustment is appropriate once the new methodology is fully implemented in 2013 and beyond. OPM does not plan to use such an adjustment in the 2012 pilot year since plans requiring an adjustment can choose not to use the new methodology. OPM intends to adjust the calculation for small or new plans for years 2013 and beyond.

Comment: A commenter recommended that OPM issue guidance for those plans that choose to participate in the 2012 MLR pilot. Specifically, the commenter would like guidance confirming that the FEHB MLR calculation will follow the HHS methodology in treatment of Federal income taxes, not-for-profit community benefits, and assessments on health insurers to support medical centers.

Response: OPM has been speaking with FEHB carriers participating in the 2012 MLR pilot about their specific concerns and has offered some guidance in that context. OPM will continue conversations with FEHB carriers as needed. OPM intends to be consistent with the HHS methodology unless doing so conflicts with the FEHB contract.

Changes made since the interim final rule was published

The interim final regulation on this subject published June 29, 2011 (76 FR 38282). In §1602.170-14 (b), the first sentence of the interim final rule read “The FEHB-specific MLR will be calculated on an annual basis with the prior year’s ratio having no effect on the current plan year.” In this final rule, OPM removed the clause “with the prior year’s ratio having no effect on

the current plan year” since OPM may use an adjustment taking previous year’s experience into account.

Also in §1602.170-14 (b), this final rule states that OPM will put forth the FEHB-specific MLR threshold no later than 12 calendar months before the beginning of plan years beginning with 2014. The final rule states that OPM will publish the 2013 threshold no later than 8 months before the beginning of that plan year. In §1602.170-14(c), this final rule explains that OPM will set a credibility adjustment in place of the one defined by HHS at 45 CFR 158.230 – 158.232.

In the interim final rule, the supplementary information included a sentence stating that “To complete the FEHB-specific MLR threshold calculation after the carrier calculated the ACA-required MLR, FEHB carriers will report claims incurred in the plan year and paid through March 31 of the following year.” OPM has determined that a longer period of claims data would create a more stable calculation for carriers and therefore OPM will request through rate instructions that carriers submit claims through June 30 of the following year. To accommodate the change in timing, carriers using the MLR methodology will have to submit a “Certificate of Accurate Cost or Pricing Data for Community-Rated Carriers” followed by a “Certificate of Accurate MLR Calculation” at a later date. In the interim final rule there was only one certificate for all carriers. The new certificate language is in §1615.406–2.

Regulatory Impact Analysis

OPM has examined the impact of this rule as required by Executive Order 12866 (September 1993, Regulatory Planning and Review) and Executive Order 13563, which directs agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public, health, and safety effects, distributive impacts, and equity). A

regulatory impact analysis must be prepared for major rules with economically significant effects of \$100 million or more in any one year. This rule is not considered a major rule because OPM estimates that premiums paid by Federal employees and agencies will be very similar under the old and new payment methodologies. This rule will be cost-neutral. OPM's intention is to keep FEHB premiums stable and sustainable using this more transparent methodology.

List of Subjects

5 CFR Part 890

Government employees, Health facilities, Health insurance, Health professions, Hostages, Iraq, Kuwait, Lebanon, Military personnel, Reporting and recordkeeping requirements, Retirement.

48 CFR Parts 1602, 1615, 1632, and 1652

Government employees, Government procurement, Health insurance
Reporting and recordkeeping requirements

U.S. Office of Personnel Management.

John Berry,
Director.

For the reasons set forth in the preamble, OPM is adopting the interim rule published June 29, 2011, at 76 FR 38282 as final with the following changes:

TITLE 48 -- FEDERAL ACQUISITION REGULATIONS SYSTEM

Chapter 16—Office of Personnel Management Federal Employees Health Benefits Acquisition Regulation

Subchapter A—General

PART 1602—DEFINITIONS OF WORDS AND TERMS

1. The authority citation for part 1602 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

2. Revise § 1602.170-14 to read as follows:

§ 1602.170-14 - FEHB-specific medical loss ratio threshold calculation.

(a) *Medical Loss Ratio* (MLR) means the ratio of plan incurred claims, including the issuer's expenditures for activities that improve health care quality, to total premium revenue

determined by OPM, as defined by the Department of Health and Human Services in 45 CFR part 158.

(b) The FEHB-specific MLR will be calculated on an annual basis. This FEHB-specific MLR will be measured against an FEHB-specific MLR threshold to be put forth by OPM no later than 12 calendar months before the beginning of plan years 2014 and beyond. OPM will publish the FEHB-specific MLR threshold no later than 8 months before the beginning of plan year 2013.

(c) In place of the credibility adjustment at 45 CFR 158.230 – 158.232, OPM will set a separate credibility adjustment to account for the special circumstances of small FEHB plans in annual rate instructions to carriers.

Subchapter C—Contracting Methods and Contract Types

PART 1615—CONTRACTING BY NEGOTIATION

3. The authority citations for part 1615 continue to read as follows:

Authority: Audit and records - 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.
Negotiation - 5 U.S.C. 8902

4. In § 1615.402, revise paragraph (c)(3)(ii)(A) to read as follows:

§ 1615.402 - Pricing policy.

* * * * *

(c) * * *

(3) * * *

(ii) * * *

(A) For contracts with 1,500 or more enrollee contracts for which the FEHB Program premiums for the contract term will be at or above the threshold at FAR 15.403–4(a)(1), OPM will require the carrier to provide the data and methodology used to determine the FEHB Program rates.

OPM will also require the data and methodology used to determine the medical loss ratio (MLR) as defined in the ACA (Public Law 111-148) and as defined by HHS in 45 CFR Part 158 for all FEHB community rated plans other than those required by state law to use Traditional Community Rating. The carrier will provide cost or pricing data, as well as the FEHB-specific MLR threshold data required by OPM in its rate instructions for the applicable contract period. OPM will evaluate the data to ensure that the rate is reasonable and consistent with the requirements in this chapter. If necessary, OPM may require the carrier to provide additional documentation.

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5. Revise §1615.406–2 to read as follows:

§1615.406–2 Certificates of accurate cost or pricing data for community rated carriers.

(a) The contracting officer will require a carrier with a contract meeting the requirements in 1615.402(c)(2) or (3) to execute one or more of the Certificates contained in this section. A carrier with a contract meeting the requirements in 1615.402(c)(2) will complete the appropriate Certificate(s) and keep such on file at the carrier's place of business in accordance with 1652.204–70. A carrier with a contract meeting the requirements in 1615.402(c)(3) will complete and submit the appropriate certificate(s) to OPM.

(b) A carrier using the SSSG methodology described in 1615.402(c)(3)(i) will submit the “Certificate of Accurate Cost or Pricing Data for Community-Rated Carriers (SSSG methodology)” along with its rate reconciliation during the first quarter of the applicable contract year. A carrier using the MLR methodology described in 1615.402(c)(3)(ii) will submit two forms. The “Certificate of Accurate Cost or Pricing Data for Community-Rated Carriers (MLR methodology)” will be submitted along with the rate reconciliation during the first quarter of the applicable contract year. The “Certificate of Accurate MLR Calculation” will be submitted when the carrier submits its FEHB-specific MLR calculation to OPM.

(Beginning of first certificate)

Certificate of Accurate Cost or Pricing Data for Community-Rated Carriers (SSSG methodology)

This is to certify that, to the best of my knowledge and belief: (1) The cost or pricing data submitted (or, if not submitted, maintained and identified by the carrier as supporting documentation) to the Contracting officer or the Contracting officer's representative or designee, in support of the ____ *FEHB Program rates were developed in accordance with the requirements of 48 CFR Chapter 16 and the FEHB Program contract and are accurate, complete, and current as of the date this certificate is executed; and (2) the methodology used to determine the FEHB Program rates is consistent with the methodology used to determine the rates for the carrier's Similarly Sized Subscriber Groups.

*Insert the year for which the rates apply.

Firm: _____
Name: _____

Signature: _____
Date of Execution: _____

(End of first certificate)

(Beginning of second certificate)

Certificate of Accurate Cost or Pricing Data for Community-Rated Carriers (MLR methodology)

This is to certify that, to the best of my knowledge and belief: (1) The cost or pricing data submitted (or, if not submitted, maintained and identified by the carrier as supporting documentation) to the Contracting officer or the Contracting officer's representative or designee, in support of the ____ *FEHB Program rates were developed in accordance with the requirements of 48 CFR Chapter 16 and the FEHB Program contract and are accurate, complete, and current as of the date this certificate is executed;

*Insert the year for which the rates apply.

Firm: _____
Name: _____
Signature: _____
Date of Execution: _____

(End of second certificate)

(Beginning of third certificate)

Certificate of Accurate MLR Calculation

This is to certify that, to the best of my knowledge and belief: the determination of the carrier's FEHB-specific medical loss ratio for * is accurate, complete, and consistent with the methodology as stated in §1615.402(c)(3)(ii).

*Insert the year for which the MLR calculation applies.

Firm: _____
Name: _____
Signature: _____
Date of Execution: _____

(End of certificate)

Subchapter H – Clauses and Forms

PART 1652—CONTRACT CLAUSES

6. The authority citation for Part 1652 continues to read as follows:

Authority: 5 U.S.C. 8913; 40 U.S.C. 486(c); 48 CFR 1.301.

13. In § 1652.216-70, revise paragraph (b)(4) to read as follows:

§1652.216-70 - Accounting and price adjustment

* * * * *

(b) * * *

(4) If rates are determined by comparison with the FEHB-specific MLR threshold, then if the MLR for the carrier's FEHB plan is found to be lower than the published FEHB-specific MLR threshold, the carrier must pay a subsidization penalty equal to the difference into a subsidization penalty account.

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